

89-1181

No. _____

Supreme Court, U.S.

FILED

JAN 22 1990

JOSEPH F. SPANOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1989

BURLINGTON NORTHERN RAILROAD COMPANY
EMPLOYEES,
Petitioners,

-vs.-

MONTANA DEPARTMENT OF REVENUE
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF MONTANA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal law provides that a rail carrier-employer shall file income tax information returns and other reports only with the state in which an employee resides or in which he has earned more than 50 percent of his income. 49 U.S.C. §11504. The Supreme Court of Montana has sanctioned the use of an administrative subpoena to require a rail carrier to file tax-related information reports on all of its employees, regardless of state of residence and regardless of the percentage of pay earned in Montana.

The question presented in this case is the following. Do 49 U.S.C. §11504 and the Supremacy and Commerce clauses of the United States Constitution prohibit the State of Montana from requiring a rail carrier-employer to produce pay records and tax information about employees who are residents of the State of Washington, who do not earn more than 50 percent of their income in Montana, and who do not travel more than 50 percent of their time or track miles in Montana?

PARTIES INVOLVED IN THE PROCEEDING

Burlington Northern Railroad Company Employees

Burlington Northern, Inc., and
Burlington Northern Railroad Company

Montana Department of Revenue

TABLE OF CONTENTS

Opinions Below	1
Jurisdictional Statement.....	1
Constitutional Provisions and Statutes Involved.....	1
Statement of the Case	1-2
Stage in Proceedings When Federal Questions Were Raised	2-3
Reasons Why the Writ Should be Granted	
1. The gathering of payroll/tax information by the Montana Department of Revenue from Burlington Northern Railroad about its non- resident employees who earn less than 50 percent of their income in Montana conflicts with 49 U.S.C. §11504(d) and such actions cannot be implemented without violating the Supremacy Clause of the Constitution	3-7
2. Montana's use of an administrative subpoena to obtain detailed payroll information about railroad employees results in an unreasonable burden being placed on interstate commerce and thus violates the Commerce Clause of the United States Constitution	7-10
Conclusion	11

TABLE OF AUTHORITIES

Cases

<u>Hamm v. City of Rock Hill</u> , 379 U.S. 306, 85 S.Ct. 384, 13 L.Ed.2d 300 (1964)	6
<u>Kansas City Southern R. Co. v. Kaw Valley Drainage Dist.</u> , 233 U.S. 75, 34 S.Ct. 564, 58 L.Ed. 857 (1914)	9
<u>Rubin v. United States</u> , 449 U.S. 424, 101 S.Ct. 698, 66 L.Ed. 857 (1981)	7

Constitutional Provisions

U.S. Const., Art. I, §8, cl. 3	1,9
U.S. Const., Art. VI, cl. 2	1,6

Statutes

Mont. Code Ann. §15-30-105	1,6
Mont. Code Ann. §15-30-305	1,6

Miscellaneous

116 Cong. Rec. 40,313 (1970)	10
H.R. 2364, 101st Cong., 1st Sess. (1989)	8
H.R. Rep. No. 207, 101st Cong., 1st Sess. (1989)	8
S. Rep. No. 1261, 91st Cong., 2d Sess. (1970)	7
28 U.S.C. §1257(a)	1
49 U.S.C. §11504 (1989)	1-8,11
49 U.S.C. §11504(d)	2-4,6

Appendix

Order to Produce Records (Subpoena Duces
Tecum)A-1, 1-2

Complaint for Declaratory and Injunctive ReliefA-2, 3-6

Answer to Complaint and Counter ClaimA-3, 7-11

Motion to InterveneA-4, 12-15

Minute EntryA-5, 16

JudgmentA-6, 17

Text of 49 U.S.C. §11504A-7, 18-19

Memorandum and OrderA-8, 20-23

Montana Code Annotated §15-30-105A-9, 24

Montana Code Annotated §15-30-305,A-10, 25

Decision of Supreme Court of the State of
MontanaA-11, 26-33

OPINION BELOW

The Supreme Court of the State of Montana issued an opinion in this case which is reported at _____ Mont. _____, 781 P.2d 1121 (1989). A copy of the Montana court's opinion is included in the Appendix at A-11

JURISDICTION

The opinion of the Montana Supreme Court was entered on October 24, 1989. Jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following Constitutional and statutory provisions are relevant to the determination of this case and are set forth in the Appendix: U.S. Const., Art. I, §8, cl. 3; U.S. Const., art. VI, cl. 2; 49 U.S.C. §11504 (1989); Mont. Code Ann. §15-30-105 and §15-30-305.

STATEMENT OF THE CASE

On August 25, 1988, the Montana Department of Revenue issued an administrative subpoena to the tax manager of Burlington Northern Railroad Company. The subpoena directed the Railroad to produce Pay Report 830A, a tax information form covering all Burlington Northern employees who worked in Montana during 1986 and 1987.

Pay Report 830A is a document which contains the names of all Burlington Northern employees as well as each employee's address; social security number; employee identification number; state of residence; an itemized listing of all states in which each employee worked during a given year; wages earned by each employee in each state; and the amount of taxes withheld by Burlington Northern for each employee in each state.

Burlington Northern refused to provide the Pay Report for employees who were not residents of Montana and who did not earn 50 percent of their income in Montana. The Railroad claimed that it was exempt from providing the tax information report under 49 U.S.C. §11504(d) and, on September 29, 1988, the Railroad filed an action for declaratory judgment and for injunctive relief.

127 Burlington Northern employees affected by the action intervened. The employees moved to quash the subpoena on the ground that 49 U.S.C. §11504(d) prohibits the State of Montana from gathering tax information and reports about employees who are not residents of Montana and who do not earn more than 50 percent of their pay in Montana during a designated year. The intervening employees are all residents of the State of Washington. None of them earned more than 50 percent of his income in Montana and none travelled more than 50 percent of his total annual track miles in Montana in either 1986 or 1987.

The Montana District Court denied the employees' motion to quash, dismissed the Railroad's action and granted the state's motion for judicial enforcement of subpoena. The employees appealed.

The Montana Supreme Court affirmed the lower court, concluding:

(1) The supremacy clause of the Constitution was not violated by the Montana Department of Revenue's issuance of the subpoena because 49 U.S.C. §11504 does not affect the power of a state to levy taxes or to obtain tax-related payroll information, and (2) The commerce clause of the constitution was not violated because Montana has the authority to levy income taxes against non-resident railroad employees and consequently has the authority to gather information needed to assess and collect taxes.

STAGE IN PROCEEDINGS WHEN FEDERAL QUESTIONS WERE RAISED

The question that is at the core of this case is the

interpretation of a federal statute, namely 49 U.S.C. §11504. The federal question has been before the court since the initial pleading was filed.

The Complaint for Declaratory and Injunctive Relief which was filed September 29, 1988, alleged that the actions of the Montana Department of Revenue violated federal law. (A copy of the Complaint is included in the Appendix, A-2).

On October 24, 1988, the Burlington Northern employees moved to intervene in the action, alleging that the federal law, rather than Montana State law, governed this case. (A copy of the Motion to Intervene is included in the Appendix, A-4).

On February 13, 1989, the Montana District Court rendered a decision in which it determined that the federal statute, 49 U.S.C. §11504

does not restrict a state's authority to tax income earned within that state. Likewise, the statute does not preclude a state from obtaining payroll information through the use of a properly issued administrative subpoena.

(A copy of the trial judge's Memorandum and Order and of its February 22, 1989, Judgment are included in the Appendix, A-6, A-8)

The Burlington Northern employees appealed.

The sole issue presented for review to the Montana Supreme Court was whether 49 U.S.C. §11504(d) prohibited the State of Montana from issuing an administrative subpoena requiring Burlington Northern Railroad to provide Pay Report 830A for employees who were residents of Washington State and who did not earn more than one-half of their income in Montana.

REASONS WHY THE WRIT SHOULD BE GRANTED

The only issue to be determined in this case is one of statutory construction: What did Congress intend by the enactment of 49 U.S.C. §11504?

The answer to that question will resolve the additional issues which relate to the Constitutional impact of the statute upon the State of Montana.

The Montana Supreme Court has decided that this federal

statute has no impact on the State of Montana. The court ruled: (1) Montana has the power to tax non-resident railroad employees who earn less than 50 percent of their income in the State of Montana and (2) The Montana Department of Revenue may require a rail carrier to provide to it tax information and wage reports concerning all of the carrier's employees.

The Montana court's decision interprets an important federal law in a way that makes it meaningless. This Court has not yet had an opportunity to interpret 49 U.S.C. §11504. Because of the effect of this law on every state in the Nation, this Court should settle the issue raised by this case.

The Burlington Northern employees believe that the Montana court erred in its interpretation of 49 U.S.C. §11504. Indeed, the actions of the Montana Department of Revenue, pursuant to Montana law, directly contravene the federal statute thus violating the Supremacy and Commerce clauses of the United States Constitution.

1. The gathering of payroll/tax information by the Montana Department of Revenue from Burlington Northern Railroad about its non-resident employees who earn less than 50 percent of their income in Montana conflicts with 49 U.S.C. §11504(d) and such actions cannot be implemented without violating the Supremacy Clause of the Constitution.

The federal statute which governs the ability of individual states to require withholding and to collect tax-related information from rail carrier-employers is 49 U.S.C. §11504. That statute provides:

(a)(2) A rail, express, or sleeping car carrier providing transportation subject to jurisdiction of the Interstate Commerce Commission . . . shall withhold from the pay of an employee . . . only income tax required to be withheld by the laws of a State, or subdivision of that State—

(A) in which the employee earns more than 50 percent of the pay received by the employee from the carrier; or

(b) that is the residence of the employee (as shown

on the; employment records of the carrier), if the employee did not earn in one State or subdivision more than 50 percent of the pay received by the employee from the carrier during the preceding calendar year. . .

(d) A rail, express, sleeping car, motor, and motor private carrier withholding pay from an employee under subsection (a) or (b) of this section shall file income tax information returns and other reports only with

(1) the State and subdivision of residence of the employee; and

(2) the State and subdivision in which withholding of pay is required under subsection (a) or (b) of this section.

(Full text of the statute is in Appendix, A-7)

In interpreting this section, the Montana Supreme Court held:

Section 11504 directs itself only to the problem of withholding state income taxes and of filing mandatory reports by the carrier. Neither of these have a direct bearing on the power of a state or other governmental entity to levy income taxes. We hold . . . that section 11504 does not preclude a state from obtaining payroll information through the use of a properly issued administrative subpoena. There is, therefore, no conflict to which the Supremacy Clause of the United States Constitution would apply. (Appendix A-11, p. 30).

The Montana court's interpretation of the federal statute is unreasonably restrictive. The Montana court decided that 49 U.S.C. §11504 applies only to those instances when "rail carriers can be required by state law to file state income tax information returns respecting its employees." (Emphasis original.) It then erroneously concluded that the federal law did not intend to prevent states from requiring rail carriers to submit tax information and reports about employees in all instances.

Based on its faulty interpretation of the federal law, the Montana Supreme Court found no conflict between 49 U.S.C.

§11504 and the Montana statutes. Those statutes include the income tax law under which Montana levies an income tax upon

every person not a resident of the state on his or her net income from every business, trade, profession or occupation carried on in the state.

Mont. Code Ann. §15-30-105. (Appendix A-9).

The Montana Department of Revenue is authorized to make such rules and require such facts and information to be reported as it deems necessary to enforce the income tax laws. Mont. Code Ann. §15-30-305. (Appendix A-10).

The Montana Supreme Court held that these statutes authorize the Montana Department of Revenue, through the use of administrative subpoenas, to require the railroad to supply Pay Report 830A—a tax information report—to the State of Montana.

This, claimed the Montana court, does not violate the supremacy clause.

The Supremacy Clause of the United States Constitution states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., art. VI, cl. 2.

Thus, to the extent that Montana's tax reporting statutes and regulations do not conflict with federal statutes they are enforceable. But if Montana's laws and regulations are in conflict with federal law, then the Supremacy Clause of the constitution requires that federal law must prevail. Hamm v. City of Rock Hill, 379 U.S. 306, 85 S.Ct. 384, 13 L.Ed.2d 300 (1964).

A clear reading of §11504(d) shows that it is in conflict with Montana's tax report collection procedure. The statute unambiguously states that a "rail . . . carrier withholding pay

from an employee under . . . this section shall file income tax information returns and other reports only with" the state in which the employee is a resident or in which the employee earns 50 percent or more of his pay. (Emphasis added.)

A statute which is clear and unambiguous on its face leaves no room for judicial interpretation. Rubin v. United States, 449 U.S. 424, 101 S.Ct. 698, 66 L.Ed. 857 (1981).

Had Congress intended that the rail carriers be required to file income tax information reports with any state demanding such information, Congress would not have limited the filings as it did.

Even if the Montana court had been able to find the statute to be ambiguous on its face and thus open to judicial interpretation, it would have had to find that there was no intent of Congress to limit the states' ability to obtain information about every employee who passes through a state while employed by a rail carrier.

Legislative history shows Congress intended to prohibit states from requiring rail carriers to file tax-related information and reports except where the affected employee was a resident of the state or where he earned more than 50 percent of his income in that state.

The problem addressed by this legislation is peculiar to those employees who are required by the nature of their employment to work in more than one State on a regular basis. Tax policies in some States have created great hardships both for interstate carriers and interstate carrier employees. . . .

The employer is also confronted with serious problems. . . . Some States which do not require withholding nonetheless require the employer to file periodic information returns. Where several States and numerous employees are involved, the administrative load can be extremely onerous for the employer.

S. Rep. No. 1261, 91st Cong., 2d Sess. (1970).

Recently Congress introduced a bill to amend Section 11504 which, once passed, will clarify this question. The

amendment would change the law to read:

(a) No part of the compensation paid by a rail carrier . . . to an employee . . . shall be subject to the income tax laws of any State or subdivision of that State, other than the State or subdivision thereof of the employee's residence.

...
(d)(1) A rail . . . carrier withholding pay from an employee under subsection (a) of this section shall file income tax information returns and other reports only with the State and subdivision of residence of the employee . .

H.R. 2364, 101st Cong., 1st Sess. (1989).

The purpose of the amendment is not to substantially change existing law, but only to "replace the existing [50 percent] formula and provide that such an employee will be subject to the income tax laws only in the state or subdivision thereof in which the employee resides. This is similar to how airline employees are treated under Federal law." H.R. Rep. No. 207, 101st Cong., 1st Sess. (1989).¹

The Montana Supreme Court erred in its interpretation of 49 U.S.C. §11504. It appears that a proper interpretation of the statute would preempt enforcement of the administrative subpoena in this case, as Montana's regulations and the federal statute are in conflict. The Supremacy Clause must therefore apply.

At the very minimum, this Court should settle the question so that interpretation of this statute is finally resolved, rather than left to the variety of interpretations that likely will occur from state to state.

2. Montana's use of an administrative subpoena to obtain detailed payroll information about railroad employees

¹The statute governing state taxation of airline employees' income provides that only the state of residence of any such employee is entitled to levy a tax upon the employee's income. 49 U.S.C. §1512.

results in an unreasonable burden being placed on interstate commerce and thus violates the Commerce Clause of the United States Constitution.

The Commerce Clause states:

The Congress shall have Power . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const., art. I, sec. 8, cl. 3.

The power granted to Congress by the Commerce Clause means that an individual state may not enact a law which imposes a direct burden upon interstate commerce. Kansas City Southern R. Co. v. Kaw Valley Drainage Dist., 233 U.S. 75, 34 S.Ct. 564, 58 L.Ed. 857 (1914).

The Montana Supreme Court found, first, that 49 U.S.C. §11504 did not affect the right of Montana to levy income taxes upon non-resident Burlington Northern Railroad employees who worked as they travelled through Montana.² The court went on to find that since Montana had a right to tax the

²The question of Montana's authority to tax any income of non-residents was not before the Montana Supreme Court. The court's assumption that Montana had the power to tax non-resident employees of a railroad who earn less than one-half of their income in the state is believed by the employees to be erroneous. This question is currently being litigated in Montana in the case of Grooms v. Montana, Flathead County, Montana, District Court Cause No. DV-89-242B. At least one state has determined that an individual state does not have the right to tax railroad employees who travel through the state, but who are non-residents and who do not earn a substantial portion of their wages in that state. Blangers v. Idaho Department of Revenue, 114 Idaho 944, 763 P.2d 1052 (1988), cert. denied, _____ U.S. _____, 109 S.Ct. 1557, 103 L.Ed. 860 (1989). The proposed amendment of 49 U.S.C. §11504, currently pending in Congress, would clearly prohibit Montana from taxing non-resident railroad employees.

The four factors which this court has held must be present before a state may impose an income tax without violating the Commerce Clause of the Constitution are not present in this case. See Amerada Hess Corp. v. New Jersey, 490 U.S. _____, 109 S.Ct. 1617, 104 L.Ed. 2d 58 (1989).

employees, it must also have the right to use whatever means it deems necessary to gather information needed to apply and administer the tax. Because Montana had the right to demand the information, the demand could not, reasoned the Montana Supreme Court, constitute an unreasonable burden on interstate commerce. The Montana court found that Congress could not have meant to limit the state's ability to gather tax-related information and reports.

Congress meant exactly that. In creating legislation that would regulate railroads involved in interstate commerce, Congress was aware of the burden of paperwork created by the revenue departments of each state.

Congress recognized the burden that multiple reporting requirements placed upon the rail carriers. Speaking on behalf of enactment of the law, Senator Prouty stated that the law would reduce

the burden upon the employer associated with multiple withholding and/or the filing of information returns with the vast number of States in which his employee may operate for some portion of any given tax year

116 Cong. Rec. 40,313 (1970).

Congress did not intend to eliminate rail employees' tax liability altogether or to eliminate state requirements for railroad reporting of employee income. What Congress intended—as is clearly shown by the law—is to limit the liability and the reporting to two states, the state in which the employee resides and the state in which the employee earns more than 50 percent of his pay.

Montana is neither the state of residence of the petitioning employees nor is it the state in which any of them earned more than 50 percent of his income in 1986 and 1987. Montana therefore cannot require reports about these employees without invading Congress's right to regulate interstate commerce and without unreasonably burdening interstate commerce.

CONCLUSION

The Montana Supreme Court has incorrectly interpreted a federal law. Because of the pervasive impact of 49 U.S.C. §11504, the proper meaning of the law should be determined by this court. This court should grant this petition and issue a writ of certiorari to the Supreme Court of the State of Montana.

POWELL & MORRIS, P.S.

By

William J. Powell

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(509) 455-9080

Counsel for Petitioners

STATE OF MONTANA
DEPARTMENT OF REVENUE

IN RE: BURLINGTON) ORDER TO PRODUCE RECORDS
NORTHERN, INC.,) (SUBPOENA DUCES TECUM)

.....

TO: Tax Manager
Burlington Northern Railroad Company
P.O. Box 64957
St. Paul, MN 55164-0952

YOU ARE HEREBY DIRECTED TO PRODUCE and make available to the Department of Revenue, its investigators and employees, as agents of the undersigned, on the 30th day of August, 1988, original records of certain individuals.

The documents which you are hereby required to produce and make available shall include, without limiting the generality of the foregoing:

Pay 830A report (or facsimile) for 1986 and 1987.

This Subpoena is issued in accordance with and pursuant to 53-2-501 and 15-1-301, MCA.

DATED this 25th day of August, 1988.

STATE OF MONTANA

/s/ JOHN D. LaFAVER, Director
Department of Revenue

STATE OF MONTANA)
)
County of Lewis & Clark) ss.

I, Charlotte Mckay, BEING FIRST DULY SWORN ON
OATH DEPOSES AND SAYS:

That I personally deposited the foregoing Subpoena in the
U.S. Mail on this 30th day of August, 1988.

/s/C Maling
Agent

/s/Shelly R. Baines
Notary Public for the
State of Montana
Residing at Helena
My Commission Expires:
1-31-89

BROWNING, KALECZYC, BERRY & HOVEN, P.C.
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(406) 449-6220
Attorneys for Plaintiffs

IN THE FIRST JUDICIAL DISTRICT, STATE OF MONTANA

BURLINGTON NORTHERN, INC.,)	
and BURLINGTON NORTHERN)	
RAILROAD)	
COMPANY,	)	Cause No.
Plaintiffs,)	
	)	COMPLAINT FOR
V	)	DECLARATORY
	)	AND INJUNCTIVE
MONTANA DEPARTMENT	)	RELIEF
OF REVENUE,)	
)	
Defendant.)	

.....

PARTIES

- 1. Burlington Northern, Inc., ("BNI") is a Delaware Corporation doing business in Montana through one or more of its wholly owned subsidiaries, including Burlington Northern Railroad Company.
- 2. Burlington Northern Railroad Company ("BNRR") is a Delaware Corporation doing business in interstate commerce, including Montana.
- 3. The Montana Department of Revenue ("Department") is an agency of the State of Montana.

FACTS

- 4. BNRR employs trainmen, who, while operating trains,

travel in interstate commerce both within and without the State of Montana, and also employs maintenance crews who work both within and without the State of Montana.

5. Employees on these train and maintenance crews are residents of various states. The state in which any such employee spends more than 50 percent of his or her working hours, or travels more than 50 percent of the total mileage he or she travels while operating a train for BNRR, is not necessarily the state of residence of any such employee.

6. On or about August 25, 1988 the Department, acting through its Director, issued an administrative subpoena, which was sent to plaintiffs on or about August 30, 1988, addressed to the tax manager of BNRR directing the BNRR produce a document referred to as the "Pay 830A Report (or facsimile) for 1986 and 1987." The return date of the subpoena was listed as August 30, 1988. Thereafter, the Department advised BNRR that the return date should have been stated as September 30, 1988 and corrected its clerical error.

7. BNRR is informed and believes that the Department is seeking Pay Report 830C, a report created and maintained by BNRR which lists, inter alia, the name, address, social security number state of residence, wages earned for work performed in Montana, and Montana withheld for each train crew member and maintenance crew member whose employment during each reporting period included work performed in the State of Montana.

8. BNRR is subject to 49 U.S.C. § 11504 which provides, in pertinent part, that BNRR shall withhold for State income tax purposes a portion of the salary of any employees only for the state in which the employee earns more than 50 percent of the pay received from BNRR, or for the state which is the residence of the employee if the employee did not earn in any one state more than 50 percent of the pay received by the employee from BNRR during the preceding calendar year.

9. Section 11504 also provides that BNRR shall file income tax information returns or other reports only with the state of residence of each of its employees and the state in which withholding of pay is required pursuant to § 11504, as explained in paragraph 8 hereinabove.

10. BNRR Pay Report 830C includes information concerning employees who work fewer than 50 percent of their total work hours in Montana or who travel in Montana less than 50 percent of their total miles traveled. BNRR Pay Report 830C includes wage and withholding information for employees for who BNRR is not required to withhold wages for Montana income taxes pursuant to 49 U.S.C. § 11504.

COUNT I.

11. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraph 1-10 of this Complaint.

12. The administrative subpoena issued by the Department is arbitrary, capricious, overly broad, and in violation of applicable law in that it requires BNRR to produce information which it is prohibited from divulging pursuant to 49 USC § 11504, and thus unduly burdens interstate commerce.

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Issue a judicial declaration that the plaintiffs here are required only to file income tax information returns with or provide other documents or information to the Montana Department of Revenue concerning employees who work on train or maintenance crews in interstate commerce as provided in 49 U.S.C. § 11504;

2. Issue a judicial declaration that the administrative subpoena at issue here is void in that it is arbitrary, capricious, and overly broad in scope in that it is required plaintiffs to provide information in violation of applicable federal law and thus unduly burdens interstate commerce;

3. Prohibit the Montana Department of Revenue from seeking enforcement of its administrative subpoena since that subpoena as issued is arbitrary, capricious, overly broad, in violation of applicable law and unduly burdens interstate commerce;

4. Grant to Plaintiffs attorneys' fees and costs; and

5. Grant such other relief as may be just and proper.

DATED this 29th day of September, 1988.

BROWNING, KALECZYC,
BERRY & HOVEN, P.C.

By /s/ Stanley T. Kaleczyc
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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS & CLARK COUNTY

BURLINGTON NORTHERN, INC.)	
and BURLINGTON NORTHERN)	
RAILROAD COMPANY,)	
)	
Plaintiff,	)	Cause No.
	)	BDV-88-797
- vs-)	
	)	<u>ANSWER TO</u>
MONTANA DEPARTMENT	)	<u>COMPLAINT AND</u>
OF REVENUE,	)	<u>COUNTER CLAIM</u>
)	
Defendant.)	

-
1. In answer to Paragraphs 1, 2, 3, 4, 5, 6, 10, and 11 the Montana Department of Revenue admits that truth of the allegation contained in Plaintiff's Complaint.
 2. In answer to Paragraph 7, the Montana Department of Revenue affirmatively alleges the document which it is seeking by virtue of the administrative subpoena served upon the plaintiff is "Pay Report 830A", therefore the department denies the allegation of the Plaintiff as set forth in Paragraph 7 of its Complaint.
 3. In answer to Paragraph 8, the Montana Department of Revenue admits the Plaintiffs is subject to the provisions of 49 U.S.C. § 11504. However, the Department does not agree with

or admit the truth of the paraphrasing of the meaning or legislative intent as stated by Plaintiff in Paragraph 8. The Department affirmatively alleges the statute speaks for itself.

4. In answer to Paragraph 9, the Montana Department of Revenue affirmatively alleges that pursuant to 49 U.S.C. § 11504, the Plaintiff is required to comply with only certain states' tax laws regarding the withholding of income tax and the filing of certain information returns. Further, the Department affirmatively alleges the statute speaks for itself.

5. In answer to Paragraph 12, the Montana Department of Revenue denies the truth of the allegation as set forth in Paragraph 12 of Plaintiff's Complaint. The Department affirmatively alleges that the administrative subpoena issued by the Department on August 30, if in full compliance with all applicable state and federal statutes.

PRAYER

WHEREFORE, The Defendant prays as follows:

1. That the Respondent be granted Judgment in its favor;
2. That Plaintiffs take nothing by their action;
3. That Defendant be awarded its costs of suit herein; and
4. That Defendant have such other and further relief as the Court may deem just and equitable.

COUNTER CLAIM

COMPLAINT FOR JUDICIAL ENFORCEMENT OF ADMINISTRATIVE SUBPOENA

In support of its Complaint for Judicial Enforcement of its Administrative Subpoena the Department of Revenue alleges that:

1. Burlington Northern, Inc. is a Delaware Corporation doing business in Montana through one or more of its wholly owned subsidiaries, including Burlington Northern Railroad Company.

2. Burlington Northern Railroad Company is a Delaware Corporation doing business in interstate commerce including

Montana.

3. The Montana Department of Revenue is an executive branch agency of the State of Montana, which is charged with the responsibility and duty of administration, enforcement, and compliance with the state's tax laws, and in particular the administration, enforcement, and compliance of the state income tax.

4. On or about August 25, 1988 the Department, acting through the Director of Revenue, issued an administrative subpoena in conformity with all the applicable statutory provisions directing the Burlington Northern Railroad Company produce a document denominated as "Pay Report 830A".

5. The return date for the subpoena was erroneously set as August 30, 1988. Thereafter, the Department advised the Burlington Northern Railroad that the correct date was September 30, 1988.

6. The Burlington Northern Railroad Co., has failed to provide the information to the Montana Department of Revenue or its agents as required by the subpoena, and therefore the Department is required to commence this action for enforcement of its subpoena.

7. The State of Montana acting through its Department of Revenue is empowered by the laws of the State of Montana to enforce compliance with laws of Montana in regard to taxation. In furthermore of those powers the Department is empowered to summon witnesses and request the production of documents.

8. Every person not resident of the State of Montana is subject to a tax with respect to his entire net income from all property owned and from every business, trade, profession, or occupation carried on in this state.

9. The Burlington Northern Railroad Inc. employs nonresident personnel in the operation of its railroad who earn income from a trade, profession, or occupation carried on in this state.

10. Pursuant to the laws of the State of Montana, the State of Montana, Department of Revenue has the authority and the power to request and receive information from the Burlington Northern Railroad Inc., to determine the names, addresses, and amounts of income earned by its personnel who earn

income from a trade, profession, or occupation carried on in this state.

11. 49 U.S.C. § 11504, is not a bar to the Department of Revenue to restrain it from performing its duties to determine the names and incomes of nonresidents subject to the tax laws of Montana or for requesting and receiving information from the Burlington Northern Railroad, Inc. to carry out those duties and responsibilities.

PRAYER FOR RELIEF

Wherefore, the State of Montana, acting through its Department of Revenue requests this court to:

1. Issue an order directing the Burlington Northern Railroad Inc. to comply with the administrative subpoena issued by the Department of Revenue on August 25, 1988, by producing "Pay Report 830A" at a date and time set by the Court;
 2. Grant to the State of Montana its attorneys' fees and costs; —
 3. Grant such other relief as may be just and proper.
- DATED this 11 day of October, 1988.

DEPARTMENT OF REVENUE
Office of Legal Affairs
Mitchell Building
Helena, Montana 59620-2702

/s/ R. Bruce McGinnis
Tax Counsel

CERTIFICATE OF SERVICE

I certify that on this 11 day of October, 1988, a true and correct copy of the foregoing has been served by placing same in the United State mail, postage prepaid, and addressed as follows:

Stanley T. Kaleczyc
BROWNING, KALECZYC,
BERRY & HOVEN, P.C.
P.O. Box 1697
Helena, Montana 59624-1697

/s/ R. Bruce McGinnis

POWELL & MORRIS, P.S.
William J. Powell
West 220 Main
Spokane, WA 99201
(509) 455-9080

LARRY ELISON
1101 Greenough Dr., Suite B-8
Missoula, MT 59802

ATTORNEYS FOR INTERVENORS

IN THE FIRST JUDICIAL DISTRICT STATE OF MONTANA

BURLINGTON NORTHERN, INC.,)	
and BURLINGTON NORTHERN)	
RAILROAD COMPANY,	)	Cause No.
	)	BDV 88 797
Plaintiffs)	
)	
vs.	)	MOTION TO
	)	INTERVENE
MONTANA DEPARTMENT OF)	
REVENUE,)	
)	
Defendant.)	
)	
JAMES R. ALLAN JERRY A.)	
BAKER, PATRICK R. BARTLESON,)	
THOMAS E. BENDER, ROBERT F.)	
BLANGERES, RONALD V. BLANK,)	
CHARLES F. BRENNAN, DONALD)	
D. BUTTS, RANDY CARTWRIGHT,)	
CLIFFORD DAVIS, R.J. EDGAR,)	
MICHAEL FISK, J.E. FLANNERY,)	
W.P. FOSTER, MARVIN L. FRANZ,)	
GARY L. FRIBERG, STEVEN E.)	
GARLAND, FREDERICK E. GEST,)	

ROBERT J. GRIFFIN, WILLIAM B.)
 GRIMES, ROBERT L. GROOMS,)
 PATRICK L. HARRINGTON,)
 DONALD J. HEINEN, VIC A.)
 HERRINGTON, JOHN HLUBOKY,)
 ROBERT D. HOUX, DONALD C.)
 HOWARD, ROBERT K.)
 HUGUENIN, DUANE JUMP,)
 GEORGE L. KENDALL, ROBERT)
 W. KING, JOHN A. KLOMP, L.P.)
 KNUTSON, JERRY D.)
 KOHLIEBER, RICHARD P. KOHN,)
 KENNETH M. LEYDE, LARRY G.)
 MACARTY, HARRY MAIER,)
 THOMAS A. MARABELLO, E.G.)
 MATHENA, DONALD W. MAY,)
 PATRICK M. McCARTHY, JOHN H.)
 PEBLES, JACK A. PETERSON, JOE)
 D. PILIK, L.W. PINKLEY, W.G.)
 QUINTON, DONALD M. REID,)
 JOHN E. ROSSI, JAMES C. SCOTT,)
 WARREN H. SHOOP, GARY R.)
 SMITH, DONALD H. STIER,)
 MICHAEL J. STOWELL, ROBERT)
 J. STRAHL, THOMAS L. TAYLOR,)
 JAMES H. THOMSON, DAVID J.)
 WARDIAN, TIMOTHY J. WATSON,)
 JAMES H. WEAVER, JEFFREY D.)
 WEST, LOUIS F. WILLIAMS,)
 MICHAEL A. WILLIAMS, STEVEN)
 M. WILSON, KEN WOLKENHAUER,)

Intervenors.)

PURSUANT to Montana Civil Rule 24, the above-named
 intervenors hereby move to intervene in the above action both
 as a matter of right and permissive intervention, and in support
 thereof show as follows:

1. As appears from the proposed complaint of intervenors attached hereto, each of the applicants claims an interest relating to the transaction which is the subject of this action, namely the enforcement of quashing of a subpoena for payroll information from Burlington Northern Railroad Company. Each of the intervenors is so situated that the disposition of this action may as a practical matter impair or impede his ability to protect his interest. The interest intervenors seek to protect is their claim of exemption of their earnings from income tax by the State of Montana due to the fact that each of the intervenors is a resident of the State of Washington is a member of an interstate train crew, and does not travel more than 50% of his track miles within the State of Montana. Each of the intervenors claims that his income is exempt from taxation and from the furnishing of information relating thereto under the provisions of 49 U.S. Code, Section 11504.

2. Intervenors also assert a claim for permissive intervention in that their claims and the main action have a questions of law or fact in common. The common question of law or fact is the applicability of 49 U.S. Code. Section 11504 to the claim asserted by the Montana Department of Revenue to payroll information from Burlington Northern Railroad Company, particularly as applies to payroll information concerning the plaintiffs, each of whom claim to be exempt from income tax withholding and from the furnishing of such information pursuant to 49 U.S. Code, Section 11504. Intervenors seek injunctions against both parties to enforce 49 U.S. Code, Section 11504.

3. In addition, several of the intervenors seek damages from plaintiffs Burlington Northern for withholding taxes from their pay in violation of 49 U.S. Code, Section 11504.

4. Other intervenors seek damages from the Montana Department of Revenue for prejudgment garnishment without notice or opportunity to be heard in violation of due process.

5. This motion is timely made within 21 days of the filing of the above-captioned action.

6. Intervention will not unduly delay or prejudice the adjudication of the rights of the original parties, but will clarify the rights of the parties. The intervenors are the ones from whom the State of Montana is seeking the collect taxes, and are

therefore the real parties in interest in this litigation.
DATED: October 18, 1988.

POWELL & MORRIS, P.S.

/s/ William O. Powell

Larry Elison
1101 Greenough Dr.
Suite B-8
Missoula, MT 59802

ATTORNEYS FOR
INTERVENORS

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

BURLINGTON NORTHERN
RAILROAD

vs

#CDV-88-797

THE DEPARTMENT OF
REVENUE

This was the time set for hearing on the Motion of the Department of Revenue to Compel, the Motion to Quash and the Motion to Intervene. Present in Court were Stan Kaleczyc, counsel for the Plaintiff, Bruce McGinnis, counsel for the Department of Revenue and Martin Elison, counsel for the Intervenor. Counsel argued the motion to intervene and the Court allowed the intervention on the question of the interpretation of 49 USC 11054. Counsel then argued the remaining motions. The Intervenor is to file their brief on the interpretation of 49 USC 11054 by November 14, 1988 and reply briefs are to be filed by November 21, 1988. The matter will then be deemed submitted.

THOMAS C. HONZEL
Presiding Judge

MINUTE ENTRY
November 1, 1988

CATHERINE JOHNSON
Court Reporter

cc: Stan Kaleczyc
Attorney at Law
P.O. Box 1697
Helena, MT 59624-1697

Bruce McGinnis
Department of Revenue
Office of Legal Affairs
Mitchell Building
Helena, MT 95620-2702

Martin J. Elison
Attorney at Law
1135 Strand Avenue
Missoula, MT 59802

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

BURLINGTON NORTHERN INC.,)
and BURLINGTON NORTHERN)
RAILROAD COMPANY,)

Plaintiffs,)

vs)

Cause No. CDV-88-797

MONTANA DEPARTMENT OF)
REVENUE,)

Defendant,)

vs)

BURLINGTON NORTHERN)
RAILROAD COMPANY)
EMPLOYEES)

Intervenor Plaintiffs.)

This action came before the court for hearing on October 28, 1988. The issues were heard, a decision was rendered, and it is hereby ORDERED AND DECREED,

That the Plaintiffs Burlington Northern, Inc., Burlington Northern Railroad Company, and Intervenor Plaintiffs Burlington Northern Railroad Company Employees' Motion to Quash Administrative Subpoena Duces Tecum is denied, and the Plaintiffs' Complaint for Declaratory Judgment and Injunction is dismissed.

That the Defendants, State of Montana, Department of Revenue's Motion for Judicial Enforcement of Administrative Subpoena is granted.

DATED this 22 day of February, 1989.

Thomas C. Honzel
District Judge

§ 11504. Withholding State and local income tax by certain carriers

(a)(1) In this subsection, an employee is deemed to have earned more than 50 percent of pay in a State or subdivision of a State if the employee —

(A) performs regularly assigned duties on a locomotive, car or other track-borne vehicle in at least 2 States and the mileage traveled in one State or subdivision of that State is more than 50 percent of the total mileage traveled by the employee while employed during the calendar year; or

(B) is engaged principally in maintaining roadways, signals, communications, and structures or in operating motortrucks from railroad terminals in at least 2 States and the percent of the time worked by the employee in one State or subdivision of that State is more than 50 percent of the total time worked by the employee while employed during the calendar year.

(2) A rail, express, or sleeping car carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter 1 of chapter 105 of this title [49 USCS §§ 10501 et seq.] shall withhold from the pay of an employee referred to in paragraph (1) of this subsection only income tax required to be withheld by the laws of a State, or subdivision of that State —

(A) in which the employee earns more than 50 percent of the pay received by the employee from the carrier, or

(B) that is the residence of the employee (as shown on the employment records of the carrier), if the employee did not earn in one State or subdivision more than 50 percent of the pay received by the employee from the carrier during the preceding calendar year.

(b)(1) In this subsection —

(A) "State" includes a State, territory, or possession of the United States, and the Commonwealth of Puerto Rico.

(B) an employee is deemed to have earned more than 50 percent of pay in a State or subdivision of a State in which the mileage traveled by the employee in that State or subdivision is more than 50 percent of the total mileage traveled by the employee while employed during the calendar year.

(2) A motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title [49 USCS §§ 10521 et seq.] and a motor private carrier shall withhold from the pay of an employee having regularly assigned duties on a motor vehicle in at least 2 States, only income tax required to be withheld by the laws of a State, or subdivision of the State —

(A) in which the employee earns more than 50 percent of the pay received by the employee from the carrier; or

(B) that is the residence of the employee (as shown on the employment records of the carrier), if the employee did not earn in one State or subdivision more than 50 percent of the pay received by the employee from the carrier during the preceding calendar year.

(c)(1) In this subsection, an employee is deemed to have earned more than 50 percent of pay in a State or subdivision of that State in which the time worked by the employee in the State or subdivision is more than 50 percent of the total time worked by the employee while employed during the calendar year.

(2) A water carrier providing transportation subject to the jurisdiction of the Commission under subchapter III or chapter 105 of this title [49 USCS §§ 10541 et. seq.] or a water carrier or class of water carriers providing transportation on inland or coastal waters under a exemption under this subtitle shall file income tax information returns and other reports only with —

(A) the State and subdivision of residence of the employee (as shown on the employment records of the carrier); and

(B) the State and subdivision in which the employee earned more than 50 percent of the pay received by the employee from the carrier during the preceding calendar year.

(3) This subsection applies to pay of a master, officer, or seaman who is a member of the crew on a vessel engaged in foreign, coastwise, intercoastal or noncontiguous trade or in the fisheries of the United States.

(d) A rail, express, sleeping car, motor, and motor private carrier withholding pay from an employee under subsection (a) or (b) of this section shall file income tax information returns and other reports only with —

(1) the State and subdivision of residence of the employee; and

(2) the State and subdivision in which withholding of pay is required under subsection (a) or (b) of this section.

(Oct. 17, 1978, P.L. 95-473, § 1, 92 Stat. 1446.)

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

BURLINGTON NORTHERN, INC.)	
and BURLINGTON NORTHERN)	
RAILROAD COMPANY,)	
)	
Plaintiff,	)	Cause No.
	)	CDV-88-797
vs	)	MEMORANDUM
	)	AND ORDER
MONTANA DEPARTMENT)	
OF REVENUE,)	
)	
Defendant)	
)	
vs)	
)	
BURLINGTON NORTHERN)	
RAILROAD COMPANY)	
EMPLOYEES,)	
)	
Intervenor Plaintiffs.)	

.....

Before the Court is the motion of Burlington Northern, Inc. (BNI) and Burlington Northern Railroad Company (BNRR) to quash the administrative subpoena duces tecum of the Montana Department of Revenue (Department) wherein the Department is seeking certain tax information regarding BNRR employees. Also, before the Court is the Department's motion for judicial enforcement of its administrative subpoena. The matter has been fully briefed and argued and is not ready for decision.

BACKGROUND

On August 25, 1988, the Department directed an administrative subpoena to BNRR requesting a copy of "Pay Report 830A" for the years 1986 and 1987. BNRR did not

comply with the subpoena and on September 29, 1988 filed this action for declaratory and injunctive relief.

On October 24, 1988, sixty-two BNRR employees moved to intervene. The Court granted the motion on November 1, 1988, but limited the scope to the question of whether the administrative subpoena should be quashed.

A motion for joinder of sixty-five additional BNRR employee intervenors was filed on November 10, 1988. On December 1, 1988, the parties stipulated to the joinder of these additional intervenors and on December 8, 1988, the Court granted the motion for joinder of additional intervenors.

DISCUSSION

The Department is seeking a document referred to as Pay Report 830A. This document contains the names of BNRR employees, their addresses, social security numbers, the employee's identification number assigned by BNRR, state of residence, an itemized listing of all states in which the employee worked during a given year, wages earned by the employee in each state, and the amount withheld by BNRR in each state: (October 11, 1988 affidavit of Dave Olsen, Supervisor of Compliance Section of Income Tax Division of the Department.) The Department asserts that this information is needed to: identify individuals who have earned income within the State of Montana; to verify wages reported by BNRR employees on tax returns voluntarily filed; and to estimate tax liabilities of BNRR employees who earned income in Montana but who have not voluntarily filed tax returns.

It is undisputed that BNRR must withhold taxes and file reports for employees who are residents of Montana and who earn more than 50% of their income in Montana; employees who are residents of Montana and who do not earn more than 50% of their income in another state; and, employees who are not Montana residents but who earn more than 50% of their income in Montana. The Department contends that it is also entitled to payroll information for BNRR employees who are Montana residents but who earn more than 50% of their income in another state and for employees who are not Montana

residents but who earn a portion of their income in Montana which is less than 50% of their total income.

The issue in the case is whether the State of Montana can require the Plaintiffs to provide payroll information on employees who are exempt from Montana withholding or whether 49 U.S.C. Section 11504 prevents it from doing so.

Section 11504 (a)(2) provides:

A rail, express or sleeping car carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter 1 of chapter 105 of this title [49 USCS Sections 10501 et seq.] shall withhold from the pay of an employee referred to in paragraph (1) of this subsection only income tax required to be withheld by the laws of a State, or subdivision of that State

—
(A) in which the employee earns more than 50 percent of the pay received by the employee from the carrier; or

(B) that is the residence of the employee (as shown on the employment records of the carrier), if the employee did not earn in one State or subdivision more than 50 percent of the pay received by the employee from the carrier during the preceding calendar year. (Emphasis added)

Section 11504 (d) provides:

A rail, express, sleeping car, motor, and motor private carrier withholding pay from an employee under subsection (a) or (b) of this section shall file income tax information returns and other reports only with —

(1) the State and subdivision of residence of the employee; and

(2) the State and subdivision in which withholding of pay is required under subsection (a) or (b) of this section. (Emphasis added)

The statute specifically limits the ability of states to withhold taxes from employees of interstate carriers. Subsection (d) of

Section 11504 restricts filing of income tax information by carriers withholding pay to an employee's state of residency and to states which may require withholding under subsection (a) or (b). The thrust of this statute revolves around withholding pay for tax purposes and the filing of information for such purposes.

Section 11504 does not restrict a state's authority to tax income earned within that state. Likewise, the statute does not preclude a state from obtaining payroll information through the sue of a properly issued administrative subpoena. To interpret the statute differently would be to place restrictions on a state's ability to tax that was not intended by Congress.

In State of Alaska v. Petronia, 418 P.2d 755, 760 (1966), the Supreme Court of Washington stated:

As an outgrowth of this case, the United States Congress in 1959 passed a law, 46 U.S.C.A. Section 601, prohibiting the withholding of any sums from a master's, officer's, or seaman's wages for state tax purposes in vessels engaged in foreign, coastwise, intercoastal, interstate, or noncontiguous trade. However, the right of the Territory of Alaska to impose taxes was not disturbed; it was only the withholding of monies from seamen's wages to which Congress directed and asserted its jurisdiction.

Based on the foregoing, the Plaintiff's motion to quash is hereby DENIED and the State's motion for judicial enforcement of its administrative subpoena is GRANTED.

DATED this 10 day of February, 1989.

/s/ Thomas C. Honzel
DISTRICT JUDGE

105-30-105. Tax on nonresident — alternative tax based on gross sales. (1) A like tax is imposed upon every person not resident of this state, which tax shall be levied, collected, and paid annually at the rates specified in 15-30-103 with respect to his entire net income as here in defined from all property owned and from every business, trade, profession, or occupation carried on in this state.

(2) Pursuant to the provisions of Article III, section 2, of the Multistate Tax Compact, every nonresident taxpayer required to file a return and whose only activity in Montana consists of making sales and who does not own of rent real estate or tangible personal property within Montana and whose annual gross volume of sales made in Montana during the taxable year does not exceed \$100,000 may elect to pay an income tax of 1/2 of 1% of the dollar volume of gross sales made in Montana during the taxable year. Such tax shall be in lieu of the tax imposed under 15-30-103. The gross volume of sales made in Montana during the taxable year shall be determined according to the provisions of Article IV, sections 16 and 17, of the Multistate Tax Compact.

History: En. Sec. 3, Ch. 181, L. 1933; re-en. Sec. 2295.3, R.C.M. 1935; amd. Sec. 2, Ch. 253, L. 1959; amd. Sec. 1, Ch. 199, L. 1963; amd. Sec. 1, Ch. 15, L. 1971; R.C.M. 1947, 84-4903; amd. Sec. 1, Ch. 422, L. 1981.

15-30-305. Department rules. The department is hereby authorized to make such rules and to require such facts and information to be reported as it may deem necessary to enforce the provisions of this chapter.

History: En. Sec. 29, Ch. 181, L. 1933; re-en. Sec. 2295.29, R.C.M. 1935; amd. Sec. 179, Ch. 516, L. 1973; R.C.M. 1947, 84-4930.

No. 89-170

IN THE SUPREME COURT OF THE STATE OF MONTANA

1989

BURLINGTON NORTHERN, INC. and
BURLINGTON NORTHERN RAILROAD
COMPANY,

Plaintiffs

vs

MONTANA DEPARTMENT OF REVENUE,

Defendant and Respondent,

vs

BURLINGTON NORTHERN RAILROAD COMPANY
EMPLOYEES,

Intervenor Plaintiffs and
Appellants

APPEAL FROM: District Court of the First Judicial District,
In and for the County of Lewis & Clark,
The Honorable Thomas C. Honzel, Judge
presiding.

COUNSEL OF RECORD:

For Appellant:

Martin John Elison, Hardin, Montana
William J. Powell; Powell & Morris,
Spokane, Washington

For Respondent:

R. Bruce McGinnis, Dept. of Revenue,
Helena, Montana
Stanley T. Kaleczyc; Browning, Kaleczyc,
Berry and Hoven, Helena, Montana

Submitted on Briefs: Aug. 3, 1989

Decided: October 24, 1989

Filed: /s/ Ed Smith, Clerk

Justice John C. Sheehy delivered the Opinion of the Court.

Under 49 U.S.C. § 11504 (a)(2), an interstate rail carrier is required to withhold state income tax from the pay of its employees only (1) if the employee earns from the employer more than 50 percent of his pay in the particular state or (2) if the employee is a resident of the particular state, but does not earn more than 50 percent of his pay in any one state.

Under 49 U.S.C. § 11504 (d), an interstate rail carrier "shall file income tax information returns and other reports only with" (1) the state of residence of the employee and (2) the state in which the withholding of income tax is required under § 11504 (a)(2).

We hold in this case that the Montana Department of Revenue may obtain by administrative subpoena information relating to Montana earnings from an interstate rail carrier respecting its employees although the carrier is not obliged to withhold Montana state income tax, and is not required to file Montana state income tax information returns or other reports under 49 U.S.C. § 11504.

On August 25, 1988, the Department of Revenue issued an administrative subpoena to the tax manager of Burlington Northern Railroad Company, requesting Pay Report 830A for all its employees who worked in Montana for the years 1986 and 1987.

Burlington Northern refused to supply informational pay

reports for all such employees claiming exemption from providing tax information under 49 U.S.C. § 11504. On September 29, 1988, Burlington Northern filed an action for declaratory and injunctive relief in the District Court, First Judicial District, Lewis and Clark County. The Department of Revenue filed an answer to the complaint and counterclaimed for an order from the District Court directing Burlington Northern Railroad to comply with the administrative subpoena issued by the Department.

On October 24, 1988, 62 Burlington Northern employees moved to intervene. The District Court allowed intervention but limited the scope of the intervenor plaintiffs' action to the issue of whether the administrative subpoena should be quashed pursuant to 49 U.S.C. § 11504. On December 8, 1988, the District Court granted a motion for joinder of 65 additional Burlington Northern employees as intervenors.

On February 22, 1989, the District Court rendered judgment, denying Burlington Northern's and the intervenors' motion to quash the administrative subpoena duces tecum, granting Department's motion for judicial enforcement of the administrative subpoena, and dismissing the complaint for declaratory and injunctive relief. From this judgment, the intervenor plaintiffs only have appealed.

From the agreed facts in the pleadings, it is shown that Burlington Northern, Inc. is a corporation doing business in Montana through one or more of its wholly owned subsidiaries. Burlington Northern Railroad Company is a corporation doing a rail carrier business in interstate commerce. Burlington Northern employees, both trainmen and maintenance persons, work both within and outside Montana. These employees are residents of various states.

On August 25, 1988, the Department of Revenue issued an administrative subpoena duces tecum to Burlington Northern, directing it to produce "Pay Report 830A for 1986-1987." The subpoena was returnable on September 30, 1988. In response, Burlington Northern filed its complaint as above stated.

The single issue presented for review is whether 49 U.S.C. § 11504 prohibits the state of Montana from requiring Burlington Northern under an administrative subpoena duces tecum to provide Pay Report 830A concerning the intervenor plaintiffs,

who are residents of Washington, and who do not work more than 50 percent of time or track miles in Montana. Burlington Northern employees base their argument on the Supremacy Clause, and the Commerce Clause of the United States Constitution.

The state of Montana levies a state income tax upon the taxable income of its residents. Section 15-30-103, MCA. A like tax is imposed upon every person not a resident of the state on his or her net income from every business, trade, profession or occupation carried on in the state. Section 15-30-105, MCA. The Montana Department of Revenue is authorized to make such rules and to require such facts and information to be reported as it may deem necessary to enforce the provisions of the state income tax laws. Section 15-30-305, MCA.

On the other hand, 49 U.S.C. § 11504 (a)(2), provides:
A rail ...carrier providing transportation subject to the Jurisdiction of the Interstate Commerce Commission ...shall withhold from the pay of an employee ...only income tax required to be held by the laws of a state...

...

- (A) in which the employee earns more than 50 percent of the pay received by the employee from the carrier; or
- (B) that is the residence of the employee (as shown on the employment records of the carrier), if the employee did not earn in one state or subdivision more than 50 percent of the pay received by the employee from the carrier during the preceding calendar year.

With respect to filing reports, 49 U.S.C. § 11504 (d), provides;

A rail ...carrier withholding pay from an employee under [§ 11504 (a)(2)] shall file income tax information returns and other reports only with —

- (1) the state ...of residence of the employee; and
- (2) the state ...in which withholding of pay is required under [§ 11504 (a)(2)].

Burlington Northern employees contend that state laws or regulations permitting the issuance of an administrative subpoena to obtain state earnings information for nonresident employees are in direct conflict with the provisions of § 11504 and therefore under the Supremacy Clause of the United States Constitution, the administrative subpoena has no validity.

The Supremacy Clause of the United States Constitution, Art. VI, Clause 2, reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ...shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

When there is a conflict between federal law and the application of an otherwise valid state enactment, the Supremacy Clause required that the federal law prevail. *Hamm v. City of Rock Hill* (1964), 370 U.S. 306, 311-312, 85 S. Ct. 384, 389, 13 L. Ed. 2d 300, 305.

Burlington Northern relies on the holding in *Hamm* and also the statement in *Aloha Airlines v. Director of Taxation of Hawaii* (1983), 464 U.S. 7, 12, 104 S. Ct. 291, 294, 78 L. Ed. 2d 10, 15, where the United States Supreme Court said:

[W]hen a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute which imposes such a tax is pre-empted.

Burlington Northern employees also rely on the legislative history of § 11504 when it was before Congress, contending that the legislative history indicates a clear intent on the part of Congress to preclude states from obtaining such tax information.

There is a basic flaw in the Supremacy Clause argument posed by Burlington Northern employees in this case. It presupposes that the provisions of § 11504 and the state income tax laws, rules and regulations are in direct conflict.

This is not the case. Section 11504 directs itself to two subjects of state income taxation: when states can require interstate rail carriers to withhold taxes from their employees for application of the particular state's income tax laws; and, when the rail carrier can be required by state law to file with the state income tax information returns respecting its employees.

The language of § 11504 and its legislative history clearly indicate the purpose of Congress to relieve carriers engaged in interstate commerce from the burden of withholding income taxes and providing income tax information returns to every jurisdiction over which the carrier operated regardless of the size of those earnings. Congress set out to provide, and did provide, certain minimums under which the rail carriers were not obliged to withhold income taxes for states or other governmental entities, or obliged to file income tax information returns.

In setting those minimums, Congress did not intend to, and the language of the statute of § 11504 shows that it did not prohibit the states or other governmental entities from levying income taxes on earnings by employees of interstate carriers within the jurisdiction of the various governmental entities. Section 11504 directs itself only to the problem of withholding state income taxes and of filing mandatory reports of the carrier. Neither of these have a direct bearing on the power of a state or other governmental entity to levy income taxes. We hold, as did the District Court, that § 11504 does not preclude a state from obtaining payroll information through the use of a properly issued administrative subpoena. There is, therefore, no conflict to which the Supremacy Clause of the United States Constitution would apply.

The intervenors also argue that enforcement of the administrative subpoena duces tecum issued by the Department of Revenue is an unreasonable burden on interstate commerce.

The Commerce Clause of the United States Constitution (Art. 1, Section 8, Clause 3) provides:

That Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes;...

Again, the intervenors rely on the legislative history of 49 U.S.C. § 11504, wherein the Senate report stated that the legislation was addressed to the problem of those employees who were required by the nature of their employment to work in more than one state on a regular basis. S. Rep. No. 91-1261, 91st Cong. 2d Sess. (1970).

We agree that under the Commerce Clause of the United States Constitution, a state may not enact a law or adopt procedures which unreasonably imposes a direct burden on interstate commerce or discriminates against it. *Union Pacific Railroad Company v. Woodahl* (D. Mont. 1970), 308 F. Supp. 1002, 1009. Senator Prouty, speaking in favor of the adoption of § 11504 stated on the floor of the Senate on December 3, 1970:

Nonetheless, Mr. President, the bill which you have before you, and which was agreed to in conference, is a very great step toward solving the unique tax problems of the employees of interstate common carriers, and, I might add, of the carriers themselves. While it does not limit the liability of such employees, it does limit the number of states which may require withholding from the compensation paid to an interstate carrier employee which may require the filing of information returns with respect to the compensation of such employees to not more than two.

Cong. Record, December 3, 1970, at 40313.

While § 11504 fixes the mandatory duties of employers engaged in interstate commerce to withhold taxes and to file reports respecting earnings in any particular state, the statute does not prohibit the furnishing of earnings information at the request of the state, or under a properly issued administrative subpoena. Since the furnishing of such information is necessary for the Department of Revenue properly to administer and apply the Montana state income tax on nonresident employees, the requirement that Burlington Northern furnish such information pursuant to the administrative subpoena cannot be an unreasonable burden on interstate commerce. We so hold, because for one reason, such employees, while in Montana,

enjoy the comfort and protection of Montana's civil and criminal laws, and so must share a proportionate burden of the cost of such protections. *Washington Rev. Dept. v. Stevedoring Ass'n.* (1978), 435 U.s. 734, 748, 98 S. Ct. 1388, 1398, 55 L. Ed. 2d 682, 695.

This Court said:

The taxing power of a state is an essential power of its sovereignty (Citing a case.) This power cannot be set aside or limited on weightless statements that a federal policy is being substantially frustrated.

Commonwealth Edison Co., et al v. State of Montana (1980), 189 Mont. 191, 217, 615 P. 2d 847, 861.

We affirm the judgment of the District Court.

/s/ John C. Sheehy
Justice

We Concur:

/s/ J.A. Turnage
Chief Justice
/s/ Diane G. Borge
/s/ R.C. McDonough
/s/ Fred Weber
Justices

